No. 81-2239

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In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD G. BLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was unlawfully seized during his encounter with airport police officers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 675 F.2d 129. The opinion of the district court is reported at 510 F. Supp. 989.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The petition for a writ of certiorari was filed on June 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After denial of his pretrial motion to suppress physical evidence and a bench trial on stipulated facts, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). The court found that petitioner would benefit from consideration under the Federal Youth Correction Act, suspended the imposition of sentence, and placed petitioner on five years' probation. A divided panel of the court of appeals affirmed.

1. The evidence below was adduced at a pretrial hearing on petitioner's motion to suppress[1] and has been set out in detail in the opinions below (see Pet. App. 2–6; 510 F. Supp. at 990–992). Briefly, it showed that on May 14, 1980, two experienced Chicago police officers, Burzinski and Kinsella, were assigned to assist in the federal Drug Enforcement Administration's airport drug courier surveillance program and were observing passengers arriving at O'Hare International Airport on a flight from the Miami-Fort Lauderdale area (Pet. App. 2–3; 510 F. Supp. at 990). The officers noticed petitioner, the first person to disembark from the flight. He was carrying a black airline travel bag and appeared nervous and disoriented to the officers as he rapidly exited the plane. The officers decided to follow him down the concourse. As petitioner neared the terminal he again appeared to be unsure of his footing, looked back over his shoulder, and stumbled (Pet. App. 3; 510 F. Supp. at 991). Petitioner stopped in the terminal at the intersection of two concourses and began looking around and behind continually for several minutes, in a manner that suggested to Burzinski that he was not looking for anyone in particular but rather was surveying the people in the area. Petitioner then proceeded to another gate and sat down in the waiting area there without first checking in, even though the check-in counter was staffed at the time. After sitting for about five minutes, petitioner picked up his bag and walked back to the concourse.

At this point the officers, who were dressed in plain clothes, approached petitioner, identified themselves, and asked if they could speak with him. Petitioner

[1] After his motion was denied, petitioner stipulated that his guilt or innocence could be determined based upon the testimony adduced at the suppression hearing together with the lab report on the seized substance. 510 F. Supp. at 990.

agreed to speak with them. Officer Kinsella inquired whether petitioner had identification and an airline ticket. In response, petitioner produced a Hawaii driver's license and a one-way ticket to Honolulu. The first-class ticket, which had been purchased for cash in Florida, was made out in a name different from that on the driver's license. Petitioner simply shrugged his shoulders in response to the officers' inquiry concerning that discrepancy, but when asked what he had been doing in Florida he told them that he had been surfing in Florida for three months and that he had harvested coconuts to earn his plane fare back to Hawaii (Pet. App. 3–5; 510 F. Supp. at 991). Officer Kinsella continued to hold petitioner's ticket and license, but held them in front of him and did not remove them from his presence.

At Officer Kinsella's suggestion, the three moved to the side of the concourse where petitioner had initially been stopped, so as to avoid disruption of traffic. Petitioner by this time appeared to be very nervous. One of the officers asked petitioner if he could search the black airline bag, cautioning that petitioner was not obliged to consent. Petitioner consented to the search, however, and immediately commenced emptying the bag himself. Handing petitioner's ticket and license to Burzinski, Officer Kinsella continued the search. He removed a shaving kit from the bag, and then reached in for a shirt. When he grasped the shirt, however, Officer Kinsella felt a firmer object within and Officer Burzinski saw a clear plastic bag, containing a white powder, wrapped in the folds of the shirt. At that moment petitioner seized Officer Kinsella's hand and told him not to search any further. As petitioner pulled the officer's hand out of the bag, the plastic bag containing the powder fell free of the shirt into the bag and was visible to Kinsella, who placed petitioner under arrest (Pet. App. 5; 510 F. Supp. at 991–992).

2. The district court made detailed findings. The court found that at no point during the encounter did either officer display a weapon or raise his voice or otherwise threaten or coerce petitioner. The duration of the stop was not longer than a few minutes, and nothing in the officers' conduct or the circumstances could have indicated to a reasonable person that he was not free to go when initially approached, the court determined. Finally, the district court found that petitioner, who was 24 years old, was an articulate and intelligent college graduate (510 F. Supp. at 992). The district court concluded (*id.* at 992–993) that petitioner was not "seized" when the officers first approached him.[2] The court additionally concluded that even if the encounter was converted into a seizure when the officers failed to return petitioner's ticket and identification, a seizure of his person at that point was justified by reasonable suspicion derived in part from the initial phase of the interview with petitioner (*id.* at 993). The court then held that petitioner voluntarily consented to the search of his bag, and that by the time he withdrew his consent the cocaine was in plain view.

3. The court of appeals affirmed petitioner's conviction. It agreed with the lower court's factual findings that petitioner's freedom "was not restrained by an overbearing show of authority" (Pet. App. 12); that petitioner was "not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment" (Pet. App. 13); and that petitioner was not coerced by the physical setting. The court accordingly concluded that neither the officers' initial approach to petitioner nor the phase of the ensuing encounter prior to the time Kinsella handed pe-

[2] The court held in the alternative that even if the initial approach were regarded as a seizure, it was supported by reasonable suspicion (510 F. Supp. at 993 n.1).

titioner's ticket and license to Burzinski was a Fourth Amendment "seizure" (Pet. App. 14).[3] The court of appeals concluded that the officers' continued retention of petitioner's license and ticket was supported by their "clearly reasonable suspicion" based upon sufficient articulable facts (Pet. App. 15–19). These included the facts that originally drew the officers' attention to petitioner, as well as his heightened nervousness as the encounter developed, petitioner's unexplained use of a false name, the cash purchase of the first class ticket, and the inconsistency between petitioner's claim of straitened circumstances and his use of a first class ticket. Finally, the court affirmed the district court's determination that petitioner voluntarily consented to the search of his bag and that the cocaine was in plain view when the officers found and seized it (Pet. App. 20).

Judge Swygert dissented. He rejected the majority's conclusion that petitioner was not "seized" when the officers approached him in the airport, finding instead that a police contact with an individual for questioning is inherently coercive whenever the individual is suspected of wrongdoing (Pet. App. 22–23). He also concluded that the officers' initial request for petitioner's license and ticket effected a seizure that was unsupported by reasonable and articulable suspicion and was accordingly impermissible under the Fourth Amendment (Pet. App. 24–26).

ARGUMENT

1. The question presented by the petition (see Pet. i, 7) is whether petitioner was seized at any time during his encounter with the Chicago police officers. But there is no occasion for this Court to consider that question because both courts below concluded that even if

[3] The court found it unnecessary to decide whether the latter event converted the consensual contact into an investigative seizure (Pet. App. 19).

the encounter became a seizure at the point Officer Kinsella handed petitioner's ticket and driver's license to Officer Burzinski (rather than returning them to petitioner) in order to free his hands to carry out the consent search of petitioner's bag, reasonable suspicion sufficient to support investigative detention of petitioner had by then arisen. Neither petitioner nor the dissenting member of the panel disputes the court of appeals' conclusion that reasonable suspicion supporting a stop existed at this juncture. Accordingly, the broadly framed question tendered for review by petitioner simply is not presented on the record of this case.

Moreover, petitioner does not appear to dispute the court of appeals' conclusion that the initial approach by the officers to him was a consensual contact, and rightly so. This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment. On the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32–33 (Harlan, J., concurring; *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart explained in his opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 554–555 (1980) (footnotes omitted):

> [A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of

> voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. [4]

Like the Seventh Circuit in this case, the courts of appeals have uniformly adopted the standard endorsed by Justices Stewart and Rehnquist for determining whether or not a seizure has taken place,[5] and petitioner does not quarrel with that standard; rather, he invokes and relies upon it (Pet. 7). Accordingly, no question as to the fundamental principles that distinguish consensual police-citizen encounters from seizures is presented here.[6]

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[4] In *Mendenhall*, a majority of the Court found no occasion to decide whether a citizen-police contact constitutes a seizure within the meaning of the Fourth Amendment in the absence of police conduct that would cause a reasonable person to believe that he was not free to leave. See 446 U.S. at 560 (opinion of Powell, J.); *id.* at 568–571 (White, J., dissenting).

[5] See *United States* v. *Moore*, 675 F.2d 802, 807–808 (6th Cir. 1982); *United States* v. *Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982); *Gomez* v. *Turner*, 672 F.2d 134, 140–141 (D.C. Cir. 1982); *United States* v. *Berry*, 670 F.2d 583, 595 (5th Cir. 1982) (en banc); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending, No. 81–307 (filed Aug. 14, 1981); *United States* v. *Patino*, 649 F.2d 724, 726, 727 (9th Cir. 1981); *United States* v. *Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *Cuevas-Ortega* v. *INS*, 588 F.2d 1274, 1277 (9th Cir. 1979); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); see also *United States* v. *MacDonald*, 670 F.2d 910, 912 (10th Cir. 1982); *United States* v. *Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982), cert. denied, No. 81–6302 (June 14, 1982); *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979); *State* v. *Reid*, 247 Ga. 445, 276 S.E.2d 617, 621 (1981), cert. denied, No. 81–180 (Oct. 5, 1981), on remand from 448 U.S. 438 (1980).

[6] This case is accordingly unlike *West* v. *United States* petition for cert. pending, No. 81–307 (filed Aug. 14, 1981).

2. The only question presented for consideration in this case, accordingly, is the highly fact-bound issue whether the court of appeals correctly applied the standard that distinguishes seizures from encounters not subject to the Fourth Amendment to the facts of this case.[7] Petitioner's only specific claim is that the court of appeals' conclusion that there was no seizure prior to the transfer of his ticket and identification from Officer Kinsella to Officer Burzinski conflicts with decisions of the Fifth and Eleventh Circuits, which, he claims, require immediate return of identification documents obtained from a traveller. No conflict warranting this Court's review exists, however.

Petitioner does not appear to claim that he was seized when he first produced his identification and airline ticket; he does not challenge the district court's determination (510 F. Supp. at 993) that he produced these "freely and voluntarily" when asked by Officer Kinsella if he could see these items. Citing *United States* v. *Berry*, 670 F.2d 583 (5th Cir. 1982), and *United States* v. *Elsoffer*, 671 F.2d 1294 (11th Cir. 1982), however, he asserts (Pet. 10–11) that Officer

[7] Thus, contrary to petitioner's contention (Pet. 7, 11), this case does not present any question necessarily to be considered by the Court in *Florida* v. *Royer*, cert. granted, No. 80–2146 (Nov. 30, 1981). There the only question decided by the lower court was that a seizure of the defendant ripened into an arrest unsupported by probable cause. *Royer* v. *State*, 389 So.2d 1007, 1018–1019 (Fla. Dist. Ct. App. 1980). The Florida appellate court expressly declined to decide whether the initial contact between Royer and police officers constituted a Fourth Amendment seizure, *id.* at 1018 n.8, or whether there were sufficient grounds to justify an investigative detention of Royer either at the outset or at some later juncture. *Id.* at 1017 n.6, 1019 n.11. It is thus far from certain that the Court's decision in *Royer* will shed light upon the question presented here. Accordingly, we believe it is unnecessary to hold this case pending a decision in *Royer*.

Kinsella's failure to return his ticket and driver's license immediately effected a seizure. Petitioner misreads the holdings of *Berry* and *Elsoffer*. In *Berry*, the en banc Fifth Circuit adopted the standard enunciated by Justice Stewart in *Mendenhall* for distinguishing seizures from mere contacts and recognized that a request for production of identification or a ticket does not, in itself, effect a seizure. 670 F.2d at 595, 597, 607 & n.26. Petitioner's suggestion (Pet. 10) that the *Berry* court determined that a seizure had occurred there immediately upon defendant Berry's compliance with an agent's request for identification seriously mistakes the holding of that case. The actual holding (670 F.2d at 603) was simply that there had been no seizure prior to or through the point at which Berry produced a driver's license and admitted his association with another traveller, thereby acknowledging that he had previously lied to the agent about his identity and association with the other traveller. The Court did not decide whether the encounter was thereafter a seizure, because it concluded that reasonable suspicion had by then arisen (*id.* at 603–604). The Court rejected any suggestion that the request for production of Berry's airline tickets or his license effected a seizure. Most significantly, the information identified by the court of appeals to support the conclusion that any seizure was justified included the information garnered from inspection of Berry's ticket and license.

To be sure, the court in *Berry* suggested (670 F.2d at 597, 603 n.26) that retention of a traveller's ticket for an undue period of time, or removal of the ticket from the traveller's presence, would tend to suggest that a seizure had occurred. And in *United States* v. *Elsoffer*, *supra*, 671 F.2d at 1297, the Court stated that retention of a ticket for an undue time during interrogation did convert the encounter into a seizure.[8] Yet neither of

[8] Each of these statements is technically dictum, for in each case the court held that reasonable suspicion had arisen by the time any seizure was said to occur.

these decisions suggests that immediate return of tickets or identification is required in every case. Rather, the rule suggested is simply that any retention must not assume a form or duration that conveys the reasonable belief that the individual could not upon request secure return of his ticket and identification and proceed on his way.

In the circumstances of this case the court of appeals' conclusion that no seizure was effected prior to the transfer of the ticket and license to Officer Burzinski is clearly correct. At no time did Officer Kinsella remove the tickets from petitioner's immediate presence or remove them from his view. Compare *United States* v. *Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980). And unlike the retention of tickets during interrogation disapproved in *Elsoffer* (see 671 F.2d at 1295–1296), the questioning here was extremely brief and related entirely to the tickets and petitioner's travel (see Pet. App. 4–5). Accordingly, even if the *Elsoffer* dictum is sound, that case is distinguishable. In short, nothing about Officer Kinsella's conduct would suggest that petitioner was being forcibly detained at that point.[9]

In any event, contrary to petitioner's suggestion, the decision below is fully consistent with the decisions in *Berry* and *Elsoffer*. Here, as in *Berry*, reasonable suspicion supporting investigative detention came into being immediately upon initial inspection of the proffered identification.[10] Officer Kinsella was immediately made aware of the discrepancy in names upon petitioner's ticket and driver's license and that petitioner had pur-

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[9] Indeed, as the court of appeals recognized (Pet. App. 14–15), it is by no means clear given the circumstances that the subsequent transfer of the ticket and license to Officer Burzinski altered the situation.

[10] In *Elsoffer* reasonable suspicion arose prior to that time.

chased an expensive first-class ticket with cash. Coupled with petitioner's extreme nervousness and the peculiar behavior that originally drew the officers' attention this sufficed to justify detention and questioning of petitioner. Thus there is no occasion for this Court to consider petitioner's central contention that, in the absence of reasonable suspicion, Officer Kinsella was required to return his ticket and license immediately upon glancing at them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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